



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**ATKITALE.**

**CRIMINAL APPEAL NO. 71 OF 2009.**

**PETER ETABO.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

**(From the original conviction and sentence by the Lodwar SRM – Mr. G.M.A. Ong’ondo in the Criminal Case No. 446 of 2007**

**delivered on 8/1/2009.)**

**J U D G M E N T.**

1. Peter Etabo, the appellant herein was charged with the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act 2006. The particulars of the offence stated that on the 20th day of May, 2007 at [PARTICULARS WITHHELD] Camp in Turkana North District within Rift Valley Province he penetrated the genital organ of S.N , a girl aged 13 years. He was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, 2006. The particulars of the alternative charge stated that on 20th May, 2007 at [...] Camp in Turkana North District within Rift Valley Province, he had an indecent act with a child namely S. N , a child aged 13 years by touching her private parts namely breasts, buttocks and genitalia (vagina). The appellant also faced a second charge of causing grievous harm contrary to section 324 of the Penal Code. The particulars of the second charge stated that on 20th May, 2007 at [...] Camp in Turkana North District within the Rift Valley Province he unlawfully did grievous harm to S.N.

2. The appellant pleaded not guilty and after trial he was convicted and sentenced to 20 years imprisonment in respect of the first count and 4 years imprisonment in respect of the 2nd count. Both sentences to run concurrently. The appellant being dissatisfied with conviction and sentence filed an appeal. In his petition of appeal which is supported by lengthy written submissions he has challenged the conviction on the grounds that no medical examination was conducted on him to match the spermatozoa that was found in the vagina of the complainant. The appellant also submitted that he was convicted based on the evidence of a single identifying witness. The trial court was also faulted for failure to consider the defence and for failure to resolve the inconsistencies that were found with the prosecution’s

witnesses.

3. This appeal was opposed by the state, the learned state counsel Ms. Bartoo submitted that the conviction of the appellant was supported by overwhelming evidence by the complainant, Thomas Riek Kong, PW2, who found the appellant in the act. The evidence of the complainant was also corroborated by Jeremiah Lodea Ewoton, PW4, a clinical officer who examined the complainant. According to the state, the prosecution's evidence was watertight and conviction is most safe. She urged the court to uphold the decision by the trial court.

4. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive to its own independent determination on whether or not to uphold the conviction and the sentence of the trial court. In so doing the court should bear in mind that it never saw or heard the witnesses testify and give due allowance for that. I now wish to set out albeit briefly the evidence before the trial court. After conducting a voir dire examination of S.N (PW1) a young girl aged 13 years the trial court found her sufficiently intelligent to give sworn evidence. She testified that on 20th May, 2007, she wanted to go to A.J Primary School to see her exam result. She was in the company of S.A. J (PW3) at the road side when they asked the appellant who was a bodaboda cyclist to transport the complainant to the Primary school and return her back so that he could be paid. PW1 rode on the appellant motor cycle but when they reached a thicket, he alighted and held PW1 by the hand. PW1 tried to run away but he caught up with her and beat her, held her by the mouth and proceeded to defile her. While in the act, PW2 testified that a person was seen carrying a girl across the seasonal river. They ran towards the scene and found a bicycle parked. They entered into the thicket looking for the owner of the bicycle and found the appellant lying on top of a girl and having sexual intercourse. The appellant had unzipped his trousers. They ordered him to get out of the girl who was screaming and when they confronted the appellant he said he had obtained the girl's consent to have sex. PW2 arrested the appellant and took him to Kakuma Police Patrol Base and handed the police the black bicker and the pants the girl was wearing.

5. This case was investigated by PC Mark Olao, PW6. He found the complainant can be taken to IRC Hospital where she was admitted between 20th May, 2007 to 25th July, 2007. The P3 form was filled by Dr. Ouuma who used to work with PW4. He told the court that he was familiar with his handwriting as they had worked together for 2 years. According to the report the complainant had bruises on her vagina, she also had bruises on her neck and a swollen upper lip. Chest wall had bruises. There was mud on external genitalia and the hymen was torn. The estimated age of the complainant was under 18 years. The age assessment was given as over 14 years according to age assessment report. PW3 who was the aunt of the complainant confirmed that she escorted the complainant to the road side and the appellant agreed to carry her on his bicycle to and from A.J Primary School and would be paid upon return. PW3 waited on the road side upto 7.00 p.m. She became worried that the complainant had not returned so she telephoned D.N.C, the uncle of the complainant regarding the disappearance of the complainant. It is at that time that the security officer came and informed that the complainant was at the hospital. When they visited her in the hospital she was unconscious and remained in the hospital for five days. She had a swollen face and neck and told PW3 and PW5 how she was defiled by the appellant in the thicket and was assaulted and was rescued by PW2 and security officers.

6. Put on his defence the appellant gave unsworn statement of defence. He gave a defence of alibi that he was 5 km away from Kakuma where he was operating bodaboda business. He was arrested because his bicycle hit a refugee when they had gone to Kakuma to buy food at about 6.00 p.m. He testified that he was shocked he was charged with the offence of defilement. After considering the above evidence the trial learned magistrate found that the prosecution proved his case to the required standards. The defence by the appellant was dismissed for lacking credibility in view of the strong case by the prosecution. The appellant was convicted on the 1st and 2nd count.

7. The evidence against the appellant was principally read by the complainant who was the victim of

the sexual assault. PW2 who accosted and arrested the appellant in the act and PW3 the aunt of the complainant who requested the appellant to carry the complainant in his bicycle to and from **A.j pPRIMARY sCHOOL**. The complainant gave the graphic and grotesque details of how the appellant dragged her in the thicket. he assaulted her. She sustained physical injuries on the face and on the neck. He removed her underpant and bicker and defiled her. The complainant was rescued by PW2 who gave also evidence of how he caught the appellant in the act of defilement. the compalinant was taken to hospital and the doctor who examined her and completed the PW3 form confirmed the injuries. the complainant had physical injuries and also injuries of her private parts. It was confirmed that she was a victim of defilement even if there was no other evidence . Under the provision of section 124 of the evidence act (Cap 80) it is provided as follows:-

***“Provided that wherein a criminal case involving asexual offence the only evidence is that a child of tender years who is the alleged victim of rthe offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court issatisfied that the child is telling the truth”.***

8. In this case there was other evidence besides that of the complainant. The appellant was caught in the act by PW2, he was positively identified by PW1, PW2 and PW3. Ther fore the was no room for a mistaken identity. The evidence against the appellant is therefore watertight. I find the conviction is safe after ecvaluation the entire evidence i find the defence of alibi without any basis. It is a mere afterthoguth and was rightly dismissed by the trial court. I see no justification for interfering with the conviction and sentence. The appellant was charged under section 8 (1) and 8 (3) of the Sexual Offences Act which provides imprisonment of a term not less than 20 years. There was confirmation of age assessment that the complainant was aged 14 years. The sentence of 20 years is appropriate. This appeal is dismissed. The decision by the trial court is upheld. The appellant to serve the sentence as ordered.

Judgment read and signed this 22nd day of February, 2011.

**M.K. KOOME.**

**JUDGE.**